No. 93-714

IN THE

Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,
Petitioner,
v.
BONNER MALL PARTNERSHIP,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. Discretionary Vacatur of Cases That Are Settled in This Court Will Not Result in the Evils Described by Bonner and Public Justice

The primary thrust of the arguments by Bonner and its *amicus* Trial Lawyers for Public Justice, P.C. (hereafter "Public Justice") is that *mandatory* vacatur of decisions in *every* case in which the parties settle would be bad for the

Federal Courts. That may be correct, but it is not what U.S. Bancorp proposes.

The decision whether to extend the *Munsingwear* rule to cases that become moot as a result of settlement is not the "all or none" proposition implied by Bonner and Public Justice. U.S. Bancorp's position, as clearly stated in its brief on the merits, is that the decision whether to vacate pursuant to 28 U.S.C. § 2106 is always within this Court's discretion. Brief of Petitioner at 37.[1] Because Section 2106 calls for an exercise of judicial discretion, a blanket practice of granting or denying vacatur in cases that become moot as a result of settlement would be an abdication or abuse of discretion. *Cf. Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1978 (1993) (Scalia, J., concurring) (reversing rule of automatic vacatur of declaratory judgment of patent validity upon a finding of noninfringement); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425, 431 (1993) (Stevens, J., dissenting) (routine practice of granting vacatur when parties settle, without taking account of third parties' interests, as objectionable as practice condemned in *Cardinal Chemical*).[2]

Bonner and Public Justice also confuse the issues in this case by suggesting that application of the *Munsingwear* rule to

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1 It is also U.S. Bancorp's position that equitable and prudential considerations usually—but not always—support vacatur in cases that become moot as a result of a setttlement. *See* Brief of Petitioner at 27-35, 38.

2 U.S. Bancorp's approach to vacatur is similar to that set forth in part II of the *amicus* brief in support of Bonner submitted by Izumi Seimitsu Kogyo Kabushiki Kaisha and Sears, Roebuck & Co., except that U.S. Bancorp's focus is on vacatur of decisions by this Court whereas they are more concerned with vacatur of decisions by the lower Federal Courts.

cases that become moot in this Court will require vacatur of decisions in all other cases that are settled. U.S. Bancorp makes no such argument. To the contrary, U.S. Bancorp has carefully distinguished the appropriateness of vacatur in "certworthy" cases in this Court and all other cases in the Federal Court system, Brief of Petitioner at 31-33, a distinction that the Court appears clearly to have recognized in *Velsicol Chem. Corp. v. United States*, 435 U.S. 942 (1978) (mem.). *See Clarke v. United States*, 915 F.2d 699, 713-14 (D.C. Cir. 1990) (dissent); *CFTC v. Board of Trade*, 701 F.2d 653, 657 (7th Cir. 1983).

Finally, Bonner muddies the waters by flatly misstating U.S. Bancorp's position as to expungement of vacated decisions, *see* Brief of Respondent at 8 ("U.S. Bancorp . . . seeks to expunge from the Federal Reporter a precedent potentially adverse to its creditor interests . . ."), and the effect of vacatur on settlements, *see id.* at 37 ("U.S. Bancorp contends that a rule allowing parties to agree to the vacatur of lower court opinions as part of a settlement on appeal would encourage such settlements"). U.S. Bancorp opposes expungement of vacated precedents from the published reports, *see* Brief of Petitioner at 35-37, and has never argued that vacatur would promote settlements, *see id.* at 28-30 (arguing that vacatur after settlement promotes equity). The resort by Bonner to such obvious "straw man" arguments demonstrates the lack of real foundation to the alleged problems of discretionary vacatur by this Court.

In truth, U.S. Bancorp's approach to vacatur is so moderate and narrowly tailored to cases that become moot in this Court that all of the evils which Bonner and Public Justice allege would flow from applying the *Munsingwear* rule to this case are illusory or avoidable through the appropriate exercise of this Court's discretion.

For example, Bonner contends that allowing vacatur in cases that are settled "would allow a party with a deep pocket to eliminate a precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate." Brief of Respondent at 34; *accord* Brief of Public Justice at 9-11. Assuming that this Court exercises discretionary oversight of vacatur, it should be easy in most cases to distinguish between bona fide settlements, as in this case, and those that are a sham.[3]

Similarly, Bonner suggests that allowing vacatur would promote "'cynical gamesmanship,'" Brief of Respondent at 36 (citation omitted), creating what Public Justice describes as "'the aura of a gaming table,'" Brief of Public Justice at 10 (citation omitted). Tactical behavior in this Court—*i.e.*, settlement and request for vacatur, instead of pursuit of review on certiorari—is highly improbable because a party would have to conclude that the risk of loss on review is greater than the combined risks of innumerable factors, including that the opposing party will refuse to accept the proffered settlement, the Court will refuse to grant vacatur, the vacated decision will remain persuasive to subsequent courts, and the vacated decision will not be replaced by a similar decision in the future.

The other concerns raised by Bonner and Public Justice are equally illusory. Vacatur by this Court will not "call[ ] into question" "the independence and integrity of the judicial system," Brief of Respondent at 33: U.S. Bancorp has expressly recognized that "this Court is never bound by the parties' actions to grant vacatur. Thus, parties might be able

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[3] The Court also could identify patterns of settlement and request for vacatur by repeat litigators and industries. *See* Brief of Public Justice at 9-10.

to 'purchase' mootness, but they cannot purchase vacatur. As such, there should be no misapprehension that vacatur by this Court subordinates the Court's wishes to the parties' acts." Brief of Petitioner at 37 (citation omitted). Nor is it likely that vacatur will inadvertently "eradicate [the] informational value" of a precedent. *See* Brief of Public Justice at 6-7 & nn.10, 11. Court of Appeals decisions typically are printed in the Federal Reporter long before this Court grants certiorari, and the filing of a petition for certiorari and any action on the petition are likely to draw greater attention to the case.

II. U.S. Bancorp Is a Proper Party To Request Vacatur of the Decisions Below in This Case

Bonner contends that U.S. Bancorp lacks standing to seek vacatur of the decisions below, and that this Court therefore cannot grant vacatur. Brief of Respondent at 20-23. The argument is founded on a misapprehension of the proceedings at issue.

U.S. Bancorp has a substantial stake—over $1 billion in loans in the Ninth Circuit, tens of millions of which are involved in chapter 11 proceedings at any given time—in whether the decisions below are vacated and has demonstrated "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends." *See Baker v. Carr*, 369 U.S. 186, 204 (1962). Bonner's acceptance of U.S. Bancorp's long-standing settlement terms merely reduced without ending U.S. Bancorp's stake in the new value issue. *Cf. International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1704-05 (1991) (adverseness necessary to resolving removal question supplied by desire to prosecute claims in state court, even if petitioners lacked standing as to underlying claims). That other lenders also have a substantial interest in the outcome of this case does not strip U.S. Bancorp of its standing to seek relief, *see, e.g.*,

Sierra Club v. Morton, 405 U.S. 727 (1972) (standing to assert claim arising out of injury to the environment); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (same), particularly absent any precedent known to U.S. Bancorp in which this Court has granted vacatur at the request of a nonparty.

This Court has treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations. *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 334 (1990); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Vacatur of the decisions below in this case would be consistent with both aspects of standing doctrine.

In the first instance, Bonner has turned the constitutional aspect of the problem on its head. U.S. Bancorp has conceded that the new value exception issue presented in this case is moot, and that Article III therefore precludes this Court from deciding it on the merits. The further argument that this Court lacks jurisdiction under Article III because U.S. Bancorp has no standing does not alter the situation: either way, the Court cannot reach the merits. Such was the case in each and every instance in which this Court vacated on account of mootness pursuant to *Munsingwear* and *Duke Power*. It is precisely *because* the Court cannot decide the underlying controversy that vacatur is appropriate. *See, e.g., United States v. Galioto*, 477 U.S. 556 (1986); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979). Standing therefore is irrelevant in a moot case. *See Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) (refusing to examine standing where case moot, granting vacatur); *Arthur v. Manch*, 12 F.3d 378, 380 (2d Cir. 1993) (same, refusing to grant vacatur because mootness was direct result of appellant's inaction). Bonner's claim that the Court cannot issue any order, including a vacatur order, in a case that does not satisfy Article III, Brief of

Respondent at 21, cannot be reconciled with this Court's repeated vacatur practice.[4]

The better view is that the Federal Courts are not constrained by Article III from vacating their own judgments. This makes sense because in vacating judgments the Courts are undoing, not extending, the exercise of their jurisdiction. This Court *must* have power to enter appropriate orders to dismiss and vacate proceedings in cases that come before it in order to remedy the improper exercise of jurisdiction. *See, e.g., International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (vacating District Court judgment with directions to dismiss case where no controversy appropriate for adjudication). Judicial control over precedent, independent of the parties' particular interests, is especially appropriate because precedents are not merely the

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4 Bonner presumably intended to cite *In re Smith*, 964 F.2d 636, 638 (7th Cir. 1992), not *O'Shea v. Littleton*, 414 U.S. 488, 493-95 (1974), for the proposition that no order, including a vacatur order, can be issued in a case that does not satisfy the "case or controversy" requirement. *Smith* involved vacatur of an unreported, unappealable District Court decision having no precedential effect. The Court of Appeals vacated all orders entered in the case, but refused to vacate the *opinions* below, apparently based on the view that opinions survive as precedent after the judgments to which they relate are vacated. *But see County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975). In direct contradiction to its suggestion that no orders can be entered if the appellant lacks standing, the Seventh Circuit correctly noted: "If a case becomes moot on appeal, *the appellate court loses jurisdiction. However*, in order to protect the appellant against a preclusive . . . use of an unappealable order, *the appellate court will order the previous orders in the case dismissed* at the same time that it dismisses the appeal." *Smith*, 964 F.2d at 637 (emphasis added) (citing *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)). The Seventh Circuit also focused solely on the appellant's interest in vacating the opinion, without considering the Federal Courts' prudential interest in vacatur.

property of private litigants. *See Izumi,* 114 S. Ct. at 431 (Stevens, J., dissenting).

More generally, as this Court explained in *Bronson v. Schulten,* 104 U.S. 410 (1881), "all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them . . ., and may then be set aside, vacated, modified or annulled by that court." *Id.* at 415 (refusing to set aside judgment after conclusion of the term in which it was rendered). Such power operates independently of Article III. Thus, in *Root Ref. Co. v. Universal Oil Prods. Co.*, 169 F.2d 514 (3d Cir. 1948), *cert. denied,* 335 U.S. 912 (1949), the Court of Appeals rejected the argument that it could not inquire into the integrity of its earlier judgment, procured by fraud, because the parties' settlement had ended the case or controversy. 169 F.2d at 521-22. "This argument completely ignores the inherent power of a court to inquire into the integrity of its own judgments. Such a judgment implies the prior existence of a justiciable case or controversy between opposing litigants . . . ." *Id.* The inherent power to vacate decisions is demonstrated by the practice of *sua sponte* vacatur. *See, e.g., Penguin Books USA Inc. v. Walsh,* 929 F.2d 69 (2d Cir. 1991).

The second, prudential aspect of standing doctrine also supports this Court's exercise of its jurisdiction to vacate the decisions below.

> [T]here are many pressures not to decide difficult issues of broad public importance. A single litigation may not provide sufficient information to support a wise decision. Courts may not be well equipped to decide the issue even after extensive litigation. An improvident decision may harm more or less narrow classes

> of individuals who are not before the court, or may botch up matters much better left to the more political organs of society.

Wright, et al., 13 *Federal Practice & Procedure* § 3531, at 350 (2d ed. 1984). Vacatur in this case would advance these prudential considerations as they relate to the new value exception controversy. *See* Brief of Petitioner at 30-31, 33-35.

Finally, the rule advanced by Bonner would not allow the Court to discriminate between cases that become moot as a result of happenstance and those that become moot for other reasons. According to Bonner, this Court *cannot* vacate purely legal decisions, regardless of the circumstances. Purely legal decisions of questionable validity affecting a great number of people would therefore be immune from review in cases where happenstance intervenes to moot the controversy. U.S. Bancorp's approach, by contrast, allows the Court to take into account the sweeping or narrow effect of a decision proposed to be vacated, and permits the Court to exercise its discretion in the appropriate fashion.

III. Unsettled Law Is Better Than "Imperfect" Law on Issues Warranting Review on Writ of Certiorari

Bonner takes the position that it is better for the Courts of Appeals to resolve important legal issues incorrectly than to leave them unsettled. *See* Brief of Respondent at 32. If certainty were always more important than the correct interpretation of the law, however, we might not have this Supreme Court. Decisions of the Courts of Appeals would be final in all cases, and the uncertainty attendant to this Court's power of review would be eliminated.

For most cases arising under the laws of the United States, this is in fact the case. Pursuant to 28 U.S.C. § 1254

and Supreme Court Rule 10.1, review on writ of certiorari is a matter of judicial discretion, not a matter of right, and will be granted only when there are special and important reasons therefor. Error alone is not enough to warrant review: "This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt,* 417 U.S. 600, 616-17 (1974). Review will be granted only in cases presenting "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), *in* 69 S. Ct. v, vi. By providing for discretionary review of a limited number of cases, the Constitution, Congress and this Court have drawn a line between the majority of cases where a certain degree of legal error is tolerable, and the minority of critical cases in which the law must be gotten right.

In granting certiorari in this case, the Court determined that the survival of the new value exception in bankruptcy law must be resolved correctly, and that "imperfect" law should not be tolerated. This is thus one of the minority of cases in which unsettled law is preferable to "imperfect" law.

Bonner's authority for preferring a settled interpretation of the law to the correct interpretation of the law is inapposite, but supports U.S. Bancorp to the extent that it provides any guidance in this case. In *Payne v. Tennessee,* 111 S. Ct. 2597 (1991), and *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), which are quoted in the Brief of Respondent at 32, the Justices grappled with the problem of when this Court's decisions should be overruled. In *Payne,* a 5-4 majority of the Court reversed two decisions

that were rendered only two and four years earlier.[5] Similarly, in *Burnet,* the four dissenting Justices would have overruled the "accepted principle" of *Gillespie v. Oklahoma,* 257 U.S. 501 (1922). 285 U.S. at 399-400. The majority of the *Payne* Court and the dissenters in *Burnet rejected* the argument advanced by Bonner, preferring what they believed to be the correct rule to the settled rule, even though every reversal of this Court's decisions unsettles to a certain extent the authoritativeness of its entire corpus of decisions.

U.S. Bancorp does not seek an unsettling reversal of the highest Court's precedent, but rather limitation of the binding authority of an intermediate court's judgment on a matter determined to be worthy of this Court's review. Vacatur in this case is thus likely to encourage, not detract from, "the evenhanded, predictable, and consistent development of legal principles" advanced by stare decisis, which "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *Payne,* 111 S. Ct. at 2609 (citing *Vasquez v. Hillery,* 474 U.S. 254, 265-66 (1986)), by allowing the difficult issue of the new value exception to percolate further before being settled in the Ninth Circuit, decreasing the likelihood that the issue will be incorrectly resolved and later reversed.

Bonner makes the further argument that the "give and take" of conflicting judgments may make interesting legal study, but disserves the needs of real people who must resolve real problems. Brief of Respondent at 32. By its reckoning, the Seventh Circuit has squandered the resources of debtors, creditors, and bankruptcy judges by failing to decide long ago

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5 *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989).

whether the new value exception survived enactment of the Bankruptcy Code. *Id.* at 32-33.

Bonner's plea for judicial action (which runs against the grain of this Court's Article III jurisprudence) would not necessarily save resources; more likely, it would merely shift the subject of bankruptcy disputes from one issue to another. New value plans of reorganization are confirmed with creditors' consent every day in cases where creditors consider the proposed new value contribution to be adequate. *In re A.V.B.I., Inc.*, 143 B.R. 738, 743 (Bankr. C.D. Cal. 1992). The survival of the new value exception thus arises only in those cases where creditors find the proposed contribution inadequate.

In such cases, creditors in the Ninth Circuit may cease to argue the purely legal issue whether the new value exception survives, and instead proceed directly to "contested matters" regarding confirmation, *see* Fed. R. Bankr. P. 3020(b)(1), in which they challenge the adequacy of the proposed new value contribution. The discovery, frequent use of expert testimony, and mini-trials attendant to such contested matters, *see* Fed. R. Bankr. P. 9014, might prove *even more costly* to the parties than litigation over the issue temporarily settled below. The Ninth Circuit also recognized in its decision below "certain conceptual difficulties regarding valuation inherent in the application of the new value exception," Pet. App. at A81 n.40, that will have to be addressed at a later date. Under the circumstances, the practical benefits of preserving "imperfect" but settled law in this case are doubtful.

CONCLUSION

For the foregoing reasons, the decisions below should be vacated.

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